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IN THE

Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-350

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

VS.

CANADIAN AMERICAN OIL COMPANY, and
FREDERICK M. TAUTENHAHN, partners,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTER STATEMENT OF THE CASE

Petitioner has utilized for the statement of facts the opinion of the United States Court of Appeals for the Ninth Circuit. Union Oil Company neglects to mention the following factual statement in the opinion (Appendix A therein, p. 3):

> "Union representatives contacted appellants and urged them to keep their prices within two cents of the pre-

vailing market price. Appellants, however, persisted in their price-cutting practices. Union countered the refusal of appellants to raise their prices by denying appellants' request for the promised sign rental discount and for the jobbership."

It is further noted that Union has failed to fully disclose the details of its storage and purchase program. Under this program Union keeps possession of the gasoline by obtaining free storage rights at the service station and adjusts the prices to the dealer based on Union's determination of the prevailing retail prices. It reserves the right to deliver gasoline at its discretion. (Cr. 1424, Supp. Vol.)

Union attempts to make the sign rental allowance and jobbership unique and unusual. In fact, it was shown by the respondents that resellers who owned or otherwise held control of the real property were allowed by Union Oil Company a meeting competition allowance or a sign rental allowance of between one and one-half to two cents per gallon. Such non-lessee stations are classified by Union as digit number 0095. Third digit 9 reflects "other retail outlet" and fourth digit 5 reflects "non-lessee dealer" (Pl. Ex. 64, 65; Cr. 339-340). Respondents attempted to pass on their expected sign rental allowance to the consumer against Union's warnings not to do so. Termination of relations followed. That Union Oil Company offered additional discounts to jobbers in the ordinary course of business is not seriously in dispute (Id.).

Dispute exists as to Union's characterization of its storage and purchase program as not involving price communications to the dealer. When Union changed its prior

determination of prevailing retail it informed the dealer of the resale price and the wholesale price (Id., Cr. 1424-1425). Authorization of such a price change may be made only by Union's Western Regional officers. The dealer's purchase price and the adjustment prices are determined by the Vice President of Marketing for the Western Region and are established without regard to state boundaries. They are changed interstate at the same time. (Appendix A, pp. 4-5).

The refinery supplying gasolines to respondents, the Oleum Refinery, is an interstate facility that supplies Oregon, Washington and Hawaii with gasolines (Appendix A, p. 5).

I. The Decision Below Is Clearly Correct

A. Interstate petroleum marketers may not fix the resale prices of its dealers.

1. This Court has consistently held that Congress may and did reach fully integrated interstate corporations in the Sherman Act in their relations with dealers when per se restraints are involved.

The court below correctly held that the Union's Storage and Purchase Program was interstate and that Union's relations with plaintiffs substantially affected the interstate program. There clearly can be no distinction between the opinion of the court below and this Court in *Simpson v. Union Oil Company*, 377 U.S. 13 (1964). Present counsel there supported the opinion of the Ninth Circuit, 311 F.2d 764, by urging, in part, that Simpson had failed to demon-

strate the requisite interstate commerce or effect thereon (Respondent's Brief, Supreme Court of the United States, October Term, 1963, No. 87, pp. 102-103). This Court in *Simpson* found no interstate commerce issue, noting the interstate character of Union's business and the extensive use of the same form as involved with Simpson in the Western States. Thus the two cases are virtually indistinguishable. Termination of relations with price deviants were utilized in both cases to support a vast interstate pricing network. It is the character of the restraint and not a quantitative effect on interstate commerce that is decisive in these cases. *United States v. Socony Oil Vacuum Company,* 310 U.S. 150, 224, footnote 59 (1940).

B. Interstate marketers of petroleum products create a flow of interstate commerce.

1. The flow of interstate commerce doctrine allows the courts to look at the interstate commerce issue as one involving the practical movement of goods and services and disallows isolation of any particular segment of interstate commerce from the whole.

Clearly this Court's opinion in *Standard Oil Co. v. Federal Trade Commission,* 340 U.S. 231 (1951) requires the courts to view interstate marketing in its entirety, and makes it an error for the District Court to have isolated any particular part of Union Oil's interstate commerce from any other part. See also *United States v. Employing Latherers Ass'n.,* 347 U.S. 198 (1954). *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186 (1974) involved a subsidiary who did not intend to nor did it engage in commerce among the several states.

The interstate commerce issue is basically one of the power of the federal Congress. Congress intended to and clearly has reached the ability of Union Oil to fix resale prices. The elimination of companies such as respondents from its marketing system in order to control their retail prices can only result in the application of the private damage provisions of the Clayton Act.

It is respectfully urged that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Dated, September 14, 1978.

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